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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DEPARTMENT OF TOXIC
SUBSTANCES CONTROL,

Plaintiff,

v.

NO. CIV. S-02-2389 LKK/DAD

PAYLESS CLEANERS; COLLEGE
CLEANERS; HEIDINGER CLEANERS;
NORGE VILLAGE CLEANERS; CAVA,
INC., a California corporation;
LOBDELL CLEANERS; CITY OF CHICO;
NORVILLE R. WEISS; JANET L. WEISS;
PAUL A. TULLIUS; VICTORIA TULLIUS;
ROBERT H. HEIDINGER; INEZ N.
HEIDINGER; 5TH AND IVY, a general
partnership; RICHARD C. PETERS and
RAMONA W. PETERS, individually and
as Trustees of the Peters Family
Trust; BETTY M. ROLLAG; RANDALL
ROLLAG; and TAMI ROLLAG,

O R D E R

Defendants.

AND RELATED COUNTER-CLAIMS.

Third party plaintiffs Richard Peters and Ramona Peters
(the "Peters" or "plaintiffs") are defendants in a cost recovery

1 suit regarding perchloroethylene ("PCE") contamination in the
2 city of Chico, California. The Peters have brought third party
3 claims for contribution and indemnity pursuant to CERCLA, 42
4 U.S.C. §§ 9601 et seq., as well various state law claims against
5 third party defendants Maytag Corporation and Fedders
6 Corporation.

7 Pending before the court is Maytag and Fedders' motion for
8 summary judgment on four of the Peters' state law claims: (1)
9 strict products liability, (2) negligence, (3) negligence per
10 se, and (4) nuisance per se. Defendants assert that the claims
11 are barred by the applicable three year statute of limitations
12 because they accrued in 1989, when the Peters were informed via
13 letter by the Department of Health Services (now the Department
14 of Toxic Substances Control ("DTSC")) that their property was
15 found to contain high concentrations of PCE in the soil.

16 The Peters, in contrast, contend that their claims did not
17 accrue upon the mere knowledge of PCE's presence on their
18 property, but rather upon a determination that PCEs contaminated
19 it. Because they believe such contamination did not occur until
20 2002, when DTSC named the Peters in the present case, plaintiffs
21 argue their claims filed in 2003 are timely under the three year
22 statute of limitations.

23 Previously, on March 18, 2005, the court held that there
24 was a distinction between the mere presence of PCE, which would
25 not give rise to suit, and the contamination of property by PCE,
26 which would. This "mere presence" versus "contamination"

1 distinction was based upon precedent from asbestos cases holding
2 that only contamination of property, not the mere presence of
3 asbestos, constitutes the physical damage necessary for accrual
4 of negligence and strict liability claims in California. San
5 Francisco Unified School Dist. v. W.R. Grace & Co., 37 Cal. App.
6 4th 1318, 1335 (1995).

7 Based upon the court's independent research, however, it
8 appears that California case law now requires plaintiffs to
9 allege physical damage to property beyond economic costs related
10 to contamination in order to state negligence and strict
11 liability claims. See County of Santa Clara v. Atlantic
12 Richfield Co., 137 Cal. App. 4th 292, 320 (2006) (concluding
13 that economic "costs for the abatement, removal, replacement,
14 and/or remediation of lead" contamination do not constitute
15 cognizable physical injury to property), interpreting Aas v.
16 Superior Court 24 Cal. 4th 627 (2000). Plaintiffs do not
17 allege, and it is not clear that they could allege, such
18 physical damage.

19 Because the parties have not addressed this subsequent
20 development in case law, the court hereby orders as follows:

21 1. The Peters and Maytag and Fedders are ORDERED to file
22 supplemental briefs, no longer than 10 pages in length, by
23 August 9, 2007 at 5:00 p.m. addressing the issue set forth
24 above.

25 2. The hearing on the motion for summary judgment (Doc.
26 219) is hereby CONTINUED to August 13, 2007 at 10:00 a.m.

